Mediation in the Modern Millenium

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CONTENT

1 Mediation: A flexible process in a Procrustean bed?

In Australia we call it "Mediation", the French say "la mediation", and the Germans "die Mediation". The term is global, stemming from the latin, *mediatio*[1]; the process universal, its inherent flexibility transcending historical and national legal norms and systemic differences. Indeed, forms of mediation can be traced back to sources in ancient Greece[2], the Bible[3], traditional communities in Asia and Africa[4], and to the fourteenth Century English 'Mediators of Questions'[5].

Mediation, however, does not exist in a vacuum. It operates against a backdrop of national dispute management culture and institutional rules and regulations. Accordingly, it is nothing less than misleading to consider mediation as a universal process in isolation. Context determines how mediation is absorbed and applied by mediators, dispute managements professionals such as lawyers, and by clients. Context defines mediation and has a direct impact on how it is practised. National legal contexts reveal historically embedded systemic differences that can provide insights into the reasons behind the rapid expansion of mediation in common law jurisdictions, and the comparatively hesitant development of mediation in civil law jurisdictions.

In this paper I consider the systemic patterns and trends in the mediation movements of common law and civil law jurisdictions, namely, Australia, Austria, Belgium, Canada, Denmark, England, Germany, the Netherlands, Scotland, South Africa, Switzerland, U.S.A. and Yugoslavia[6]. The ideas and concepts introduced in this paper are drawn from the wealth of data and critical analysis contained in the collection of national reports on mediation presented to the XVIth Congress of the International Academy of Comparative Law at The University of Queensland, Brisbane in July 2002[7]. Accordingly, it is not the aim of this essay to describe or summarise the role of mediation in each of the aforementioned countries. This task has been undertaken with a great deal more expertise than I could claim by the national rapporteurs in their submissions to the Congress. Their national reports are due to be published by the Otto-Schmidt Verlag in Germany in late 2002.

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[1] A Kemmann and M Gante-Walter, Zur Begriffsgeschichte der Mediation, *ZKM*, 273-4.

[2] Ibid.

[3] See Matthäus 5,9; 1. Timotheus 2,5-6; Korinther 6,1-4.

[4] On the earlier forms of consensus-based dispute resolution, or mediation in traditional communities such as the Nuer in Sudan and the Ndendeuli in Tansania, see A Holtwick-Mainzer, *Der übermächtige Dritte: Eine rechtsvergleichende Untersuchung über den streitschlichtenden und streitentscheidenden Dritten* (Berlin, 1985), p 40; P Gulliver, 'Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania', in L Nader, (ed.), *Law in Culture and Society* (Chicago, 1969), p 24. On the application of mediation in China and the Asian region, see D Bagshaw, 'China: Mediation in Divorce is an All-In Affair Now' (1995) 2 *Australian Lawyer* 24; H Gallagher, 'The Eastern Approach' (1995) 69 *Law Institute Journal* 64; T Krapp, 'Zivilrechtliche Schlichtung an japanischen Gerichten', in W Gottwald and D Strempel (ed.), *Streitschlichtung: Rechtsvergleichende Beiträge zur außergerichtlichen Streitbeilegung* (Köln, 1995), p 77.

[5] P Dwight, 'Commercial Dispute Resolution in Australia Some Trends and Misconceptions' (1989) 1 *BLR* 1.

[6] Australia, England, Scotland, Canada, South Africa and the USA possess a common law tradition (with some exceptions in South Africa and Quebec, Canada); Germany, Austria, Denmark, the Netherlands, Belgium, Germany, Switzerland and Yugoslavia belong to the civil law tradition.

[7] I have drawn on the following papers in putting together this essay: M Paleker, National Report on South Africa;

2 Reasons behind the recent global developments in mediation

Alternative Dispute Resolution (ADR) processes[8] are now recognised not only as a distinct system of dispute resolution but also as a system that interacts *inter*dependently with the legal system. This is most clearly demonstrated in the context of court-related mediation, which is increasingly seen as an effective way to increase access to, participation in, and satisfaction with the way legal disputes are resolved. Cappelletti categorises ADR as the third wave in the world-wide access to justice movement. ADR provides a different approach and a different sort of justice for solving disputes – what Cappelletti labels 'co-existential justice'[9].

In terms of legal practice and legislative activity, mediation is arguably the fastest-growing form of ADR in the world. The primary reasoning behind its rapid expansion and growing acceptance lies in the widespread belief that mediation offers not only quantitative but also qualitative advantages over adjudication and other determinative dispute resolution processes[10]. In addition to the dissatisfaction with the costs and time involved in litigating disputes and the need to reduce court caseloads, emerging legal and political developments are demanding a different 'access to justice' across the globe. Whether it be:

- the recognition of the alienating effects on 'community' that accompany the over-regulation and legalisation of disputes[11],
- the globalisation of law in relation to the internationalisation of consumer and environmental protection laws and of trade[12],
- the increasing self regulation of certain industry groups particularly in the banking, financial and commercial sectors[13], or
- socio-cultural changes such as the decline of the culturally homogenous nation-state, the increasing pluralisation of societal value systems and the emerging role of women in the workplace[14],

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[8] ADR refers to all those dispute resolution processes, which provide an alternative to litigation. The use of the word 'alternative' is, however, controversial because it suggests that litigation is the 'normal' and usual method of dispute resolution. In fact, this is not the case. Most legal cases in both common law and civil law jurisdictions: for example see H Astor and C Chinkin, *Dispute Resolution in Australia,* (1992), *p 28;* D Paratz, *Mediation: A User's Guide* (1992), p 10 on Australia, and Stock in W Gottwald and D Strempel (ed.), *Streitschlichtung: Rechtsvergleichende Beiträge zur außergerichtlichen Streitbeilegung* (1995) p 124 on Germany. Accordingly some authors have suggested the use of the term 'appropriate' or 'additional' dispute resolution' instead of 'alternative' dispute resolution: see, for example, L Street, 'The Language of Alternative Dispute Resolution' (1992) 66 *Australian Law Journal* 194. On this point see also Blankenburg, E., 'Die Infrastruktur der Prozessvermeidung in den Niederlanden', in: W Gottwald and W Strempel (ed.), op cit (n 1), p 139.

[9] M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1995) 56 *The Modern Law Review* 287.

[10] E Blankenburg and J Stock, *Endbericht: Sekundäranalyse der Literatur zur aussergerichtlichen Streitbeilegung im Auftrag des Bundesministeriums der Justiz* (1999).

[11] K Röhl, 'Rechtspolitische und ideologische Hintergründe der Diskussion über Alternativen zur Justiz, in: Blankenburg', E. / Gottwald, W. / Strempel, D. (ed.), Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven (1982) p.19.

[12] V Gessner, 'Praesumptio Similitudinis? – A Critique of Comparative Law', The Proceedings of 1995 Annual Meeting, Research Committee of Sociology of Law, International Sociological Association, *Legal Cuture: Encounters and Transformations* (1995), p 3. See also H Leeb, 'Entlastung der Justiz – Notwendigkeit, Gefahren, Chancen' (1998) 40 *Mediation und Recht* 5.

[13] See, for example, ombudsman programs in the banking sector: T Hoeren, 'Der Ombudsmann in der Banken- und Versicherungswirtschaft -Verfahrensrechtliche Aspekte der aussergerichtlichen Schlichtung von Kundenbeschwerden' in: W Gottwald and D Strempel (ed.), op cit (n 1), p 149. Australian industry dispute resolution schemes can be found in the telecommunications, energy, banking and financial industries: National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for ADR Standards,* Report to the Commonwealth Attorney-General (April, 2001), p 21.

one thing is certain - legal systems need to offer a more diverse and flexible range of dispute resolution methods that include co-operative and interest-based behaviour and communication patterns in decision-making and conflict resolution contexts.

ADR methods, and in particular, mediation, aim to do just that – increase the qualitative range of dispute resolution methods available to disputants. Experiencing rapid growth worldwide, ADR is now an integrated part of many common law jurisdictions. Current developments in civil law jurisdictions indicate the emergence of a similar ADR movement in these jurisdictions.

3 Mapping mediation movements across the globe

Mediation has grown rapidly in many common law jurisdictions such as USA, Australia, Canada, and England since the 1970's and 1980's. The current state of mediation practice in most common law jurisdictions can be traced back to the establishment of community justice centres in the 1970's and 1980's. In Australia, Canada, England and the USA today ADR exists most courts and tribunals, which means that no category of legal dispute is excluded from the potential application of ADR, and in particular, mediation. The growth of mediation in these jurisdictions has been supported by a number of factors. First, long court waiting lists, court costs and disputant dissatisfaction with the nature of court processes has prompted the development of court-related mediation procedures allowing courts to refer matters to mediation. Second, the concept of mediation as a qualitatively different process from adjudication and arbitration has, in the past 20 to 30 years, been pro-actively promoted in the wider community.

In contrast, civil law jurisdictions have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes. Compared with the Australian experience, mediation in jurisdictions such as Germany, Austria, Denmark, Belgium, Germany, Switzerland and Yugoslavia has, and is still travelling a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation. Even the development of mediation in French influenced Quebec compared with Ontario reflects the general differences between the civil law and the common law mediation movements. It took many years for the civil law pioneers of mediation to attract any significant attention from practitioners and the wider community. Despite early discussions on the topic, it was not until the 1990's that the mediation movement began to enjoy more than academic attention in most of the civil law world. Over the past decade a plethora of mediation books and articles have been published, not to mention the many mediation conferences and seminars that have taken place. Current litigation reforms are heavily focussed on reducing court waiting lists through court-related mediation schemes. Such developments indicate that, in general, civil law mediation movements are repositioning themselves from the academic to the practitioner-focused political arena. As a well-recognised and practised form of dispute management, however, mediation in civil law jurisdictions is still waiting in the wings.

Two exceptions to the common law civil law distinction as it applies to mediation are the Netherlands and South Africa.

The Netherlands, although embracing a civil law tradition has historically taken a pro-active approach in legal reform, borrowing from both civil law and common law jurisdictions. As a result, mediation developments in the Netherlands, while not comparable to that of common law jurisdictions such as Australia and the USA, lead the way in terms of mediation innovation in the civil law world.

South African lawyers essentially apply a common law process to laws drawn from the civil codes of European jurisdictions. The system is a kind of uncodified civil law, which exists

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[14] D Kolb and G Coolidge, 'Her Place at the Table: A Consideration of Gender Issues in Negotiation' (1988) *The Program on Negotiation Working Paper Series* p 4. See also M Power, ' Does a Woman Negotiator Have to be Like a Man?' (1994) 5 *Australian Dispute Resolution Journal* 49.

against the backdrop of traditional community dispute management fora still used today, such as the ***makgotla***. In addition, the fall of the apartheid system opened the entire spectrum of human rights, discrimination, constitutional and environmental issues to ADR and put mediation on the South African map at a time when ADR processes were just entering legal reform discussions. Consequently, ADR plays a unique role in South Africa despite a still very resistant legal profession. Generalisations made about common law and civil law systems do not necessarily apply here.

3.1 Recurring global themes

Despite differences in the developmental stages of mediation practice in common law jurisdictions and civil law jurisdictions common themes of academic debate centring on quality issues relating to structures, process and outcomes have emerged. Recurring **structural issues** include the continuing universal debate on standards for mediation practice and mediator accreditation; how to determine the suitability of a dispute for mediation ('fitting the forum to the fuss'); flexibility versus regulation; and the systemic challenge of how to mobilise mediation practice in the shadow of the court with particular focus on the key legal stakeholders – lawyers and judges. The significant discrepancy between the practice of mediation (e.g. mandatory mediation, evaluative/ positional mediation) and the theory of the mediation process (e.g. voluntary process, interest-based) is one of the major challenges facing the future of mediation in terms of **process quality**. The theory-practice gap is arguably more pronounced in court-related mediation where lawyers or judges often play a role in the mediation process. In terms of **outcomes** one of the key issues is whether, and, if so, to what extent, the policy aims of mediation, such as improving access to justice, reducing court waiting lists and increasing consumer satisfaction with the legal system, have been fulfilled and can be fulfilled.

3.2 Common law versus civil law patterns

Whereas the tradition of the common law has been a piecemeal development of court decisions (case law), the civil law drew upon Roman law and as such is founded on doctrinal law i.e. law laid down by scholars in an abstract and complete (no gaps) codified form. The German legal scientific revival of the late nineteenth century influenced the revisions of civil codes through Europe resulting in an even greater focus on the theoretical and scientific approach to law. The systematic and conceptual approach to making law has been adopted throughout the civil legal system by scholars, legislators, lawyers and judges. Merryman argues that the conceptual structure of civil law jurisdictions and its inherent unstated assumptions about law and the legal process deeply affect how legal stakeholders think and work. As a point of comparison, he points out that attempts in England and the United States to emulate German legal science towards the end of the nineteenth century failed. The reason, he suggests, lay in the fear that the introduction of systematically rigid concepts of law and order would sacrifice the ability of the common law system to flexibly adapt to the ever-changing needs of an increasingly complex society[15].

Furthermore, whereas common law is based on a populist and democratic view of state authority, Damaska argues that civil law procedure is based on a hierarchical bureaucratised view of state authority[16]. In the same vein and discussing general cultural tendencies, Dagtoglou suggests that Anglo-Americans see state authority as a restriction on their personal freedoms, compared with Europeans, who consider state authorities have an obligation to citizens to maintain social values, provide social order and services.[17]

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[15] J Merryman, *The Civil Law Tradition* (California 1969), p 85.

[16] M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, (Yale 1986) p 17.

[17] P Dagtoglou, ' Diskussionsbeitrag', in Hoffmann-Riem and Schmidt-Assmann (ed), *Konfliktbewaeltigung durch Verhandlungen*, (Baden-Baden, 1990), p 324.

Mediation in the common law world has enjoyed rapid growth in the past 20 to 30 years as the result of pressure on politicians and governments to respond to an inefficient, protracted and, for most citizens, unaffordable and highly unsatisfactory litigation process. Such a political context coupled with a flexible legal system with in-built procedures for adapting to change and a cultural mentality open to democratic and private sector service innovations, common law jurisdictions have, to a large extent, embraced the service-delivery and self-determination advantages that mediation offers.

Meanwhile mediation has also established itself in European civil law jurisdictions. Yet the journey has been somewhat different. Whereas the mediation movement in most common law jurisdictions can be characterised by an early period of experimentation and diverse practice moving only recently towards institutionalisation by dealing with issues of strictly regulated court-referrals, practice standards, professionalisation of the industry and uniform accreditation, civil law jurisdictions have moved directly to regulate and institutionalise mediation. Perhaps this reflects the desire to be addressing ADR issues on a global scale rather than maintain developmental differences in world mediation movements. On the other hand, it could also reflect the civil law culture of systems, codes and regulation.

As was the case in the early years of the mediation movement in common law jurisdictions, the "pioneering" years of mediation in civil law jurisdictions were characterised by the flowering of a diverse range of mediation organisations and programs. Unlike the early common law experience, however, the tendency in civil law Europe from the start has been to categorise and separate mediation services and training strictly according to legal practice area. For example, the majority of mediation organisations focus on a practice area such as family law disputes, commercial disputes or environmental disputes, while a minority offer a general mediation training program. In common law jurisdictions, on the other hand, the majority of organisations offer either (1) general mediation services and training without limiting their offer according to practice area, or (2) a general mediation training course followed by the opportunity to specialise in a particular practice area. Family mediation accreditation sometimes proves the exception to this generalisation.

One of the common challenges across the globe has been the mobilisation of mediation in the shadow of the court with particular focus on the key legal stakeholders – lawyers and judges. Court-related mediation initiatives have been the primary vehicle for the mobilisation of mediation with respect to legal disputes. Despite a great deal of debate about the constitutional validity and legitimacy of mandatory court-referrals to mediation, today's reality is that the mandatory mediation cases make up the collective bulk of mediation matters in the common law and civil law jurisdictions. Court-referred mediation is increasing regulated by legislation and generally takes one of the following forms:

1. Referral by the court with the consent of the parties;
2. Referral by the Court, where the court considers the matter suitable for mediation irrespective of the views of the parties on the matter;
3. Routine mandatory referral, where disputants must first attempt mediation before filing a claim in court.

Where the parties and their lawyers consider that the matter is likely to be referred to mediation by a court, anecdotal evidence from common law jurisdictions suggests that many matters move "voluntarily" into mediation before the referral stage.

In terms of the mediation process, an interest-based theory underpins conceptual thinking, training and education throughout the world, however the theory-practice gap continues. It seems that mediators, whether or not they have undergone accreditation training, tend to mediate in a manner that reflects their previous "profession" whether as lawyers, engineers, social workers, psychologists or academics. As mediators gain experience and expertise they refine, hone, enhance and extend their skill-base as they move into the still developing profession of mediator. As the great global debate on who can or should mediate, and whether

lawyers or professionals with socio- and psychology backgrounds make better mediators continues, an interesting common law/civil law distinction with respect to the perception of the judicial role in a mediation context emerges. The function of the civil law judge to attempt to encourage disputing parties to settle a matter before deciding it has led to a view in civil law jurisdictions (with no significant parallel in common law jurisdictions) that judges are the most logical choice as mediators of legal disputes. While this view has a significant following, particularly amongst the judiciary, it is by no means without opposition. In fact, the early mediation movement in civil law Europe was strongly resisted by the legal profession with the result that non-lawyers began to carve a niche for themselves as mediators of disputes well before the legal profession became involved. True to the motto: "If you can't beat 'em, join 'em", civil lawyers quickly joined their common law colleagues and buoyed by a mixed motivations have led the global trend to institutionalise and legalise mediation as a unique form of dispute settlement. While the trend to institutionalise is well on its way especially with the recent US Uniform Model Law on Mediation, mediation as a movement and as a profession remains in its infancy with many opportunities and challenges ahead.

4 Can mediation really transcend national legal systems?

The fact that the themes considered in this paper reoccur time and time again in every legal jurisdiction that has introduced mediation reflects the universal application of mediation together with its ability to transcend legal norms and cultural differences in order to help people resolve their differences on a human level. As mediation becomes more routinely intertwined with court-proceedings, the dispute resolution culture in the legal system will itself change. Indications of legal cultural change can be found already in Anglo-American jurisdictions, where mediation skills coaching forms an integral part of university law curricula and where, even in jurisdictions with obligatory mediation schemes, many litigation lawyers have developed a practice of early voluntary referral to mediation in appropriate cases[18].

It follows that with the exception of a few pre-mediation procedural variables, the design of a best-practice formula for mediation models and systems cannot be significantly dependent on the nature of the legal system in which it operates. In other words, there is no reason for common law based mediation models to significantly differ from civil law models. On the other hand, legal, political and cultural differences have affected and continue to affect overriding structural issues such as mobilisation of mediation and its effect on access to justice.

The difference between the common law and civil law legal systems means that, in particular with respect to structural issues, common law success stories may not necessarily directly translate to civil law success stories. Nevertheless, the civil law world looks to leading ADR common law jurisdictions for trend indications, policy ideas, evaluations of pilot and continuing projects in the field of mediation. Why? First, because the universal nature of the mediation process means that while differences in legal systems and legal families must be considered, such difference does not inhibit valuable comparative research and second, the fact that that, at this stage, there is nowhere else to look. There is, however, a real risk associated with an ad hoc pattern of international comparison and policy transfer in a field as new as mediation. Which success stories are likely to translate and which are not? A comprehensive understanding of both mediation and the legal, political and cultural constructs in which court-related mediation is embedded are required to approach this question. At the same time the benefit of insight works both ways. Despite many similarities, mediation developments in civil law jurisdictions also differ from those in common law jurisdictions, for example, with respect to the development of mediation institutions, the debate on the role of

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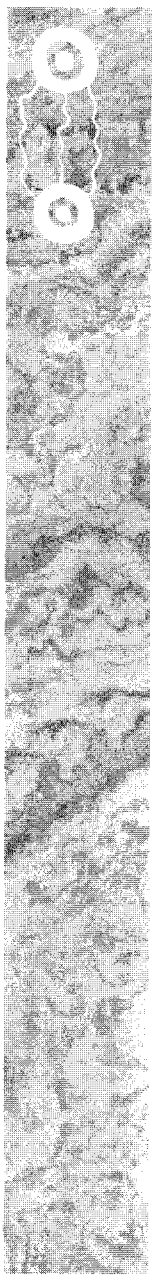
[18] See N Alexander *Wirtschaftsmediation in Theorie und Praxis* (1999) p 123-124, and N Spegel, 'Lawyer Attitudes Toward Mediation' (1998) *National Law Review* 17.

lawyers and judges in mediation, and the rate of regulation of mediation[19]. The common law world can also learn from the European early experiments and experiences with mediation systems.

With the global trend towards the institutionalisation of mediation, law and legal systems will continue to exert a greater influence on the practice of mediation. Simultaneously, converse trends towards globalisation and seamless transacting require flexible dispute resolution processes that transcend national systems. In this regard, the comparative lessons from civil and common law mediation developments provide valuable and timely conceptual challenges for the world stage.



[19] N Alexander, 'Die Institutionalisierung von Mediation – Entwicklungen in den USA, Australien und Deutschland' (2001) 4 *ZKM* 162 – 167.